Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules

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INVESTOR-STATE ARBITRATION REVISED:
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I. INTRODUCTION

In recent years, the number of investor-state arbitrations—administered by the International Centre for Settlement of Investment Disputes (ICSID), an arbitral institution affiliated with the World Bank,1 or under the United Nations Commission on International Trade Law (UNCITRAL) Rules2—has increased dramatically, resulting in a growing body of international investment law. This growth is largely the result of the proliferation of bilateral investment treaties (BITs),3 and free trade

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3. BITs became common during the 1980s and 1990s as a means of encouraging capital investment in developing markets. Many BITs contain provisions dealing with the enforceability of international arbitration agreements. In addition, some BITs (including the US Model BIT) obligate a host state, at the request of the investor, to submit investment disputes to binding third-party arbitration. As of June 2006 there were 2,506 BITs worldwide. U.N. Conference on Trade & Development, International Investment Rule-Setting: Trends, Emerging Issues and Implications, at 3, U.N. Doc. UNCTAD/TD/B/COM.2/73 (Jan. 5, 2007).
agreements (FTAs) at the bilateral, regional, and interregional levels, which allow private investors to resort to arbitration to protect their commercial interests against measures adopted by states in their sovereign capacity. Generally, investors may choose one of the following options as the basis for their investor-state arbitrations: the ICSID Convention, where both the respondent state and the claimant investor’s home state have ratified the Convention; ICSID’s Additional Facility Rules,\(^4\) where either, but not both, the claimant’s home state or respondent state has ratified the ICSID Convention; or the UNCITRAL Arbitration Rules. Indeed, “of the 2,300-odd [BITs] now in existence, more than 1,500 provide for arbitration administered by [ICSID].”\(^5\) Also, of the over 219 known investor-state arbitrations so far, about 30 percent have used the UNCITRAL Rules.\(^6\)

Additionally, private investors have demonstrated an increased willingness to rely on international investment agreements to resolve transborder disputes. Indeed, after a slow start, ICSID’s facilities are better known in the international business community and used with greater frequency, especially following the financial crisis in Argentina, which sent a large number of cases to ICSID arbitration.\(^7\)

The rapid expansion in ICSID’s caseload, however, has not produced a concomitant increase in manpower or change in governing structure. Indeed, ICSID remains small, staffed by about a dozen lawyers, with the general counsel of the World Bank serving as its \textit{de facto} part-time Secretary-General.\(^8\) Consequently, ICSID has struggled to maintain an efficient, highly technical investor-state arbitration process. Commentators question whether ICSID “has the financial backing, governmental support and ‘ICSID-arbitration focused’ senior management required to fulfill its growing responsibilities.”\(^9\)

Likewise, the UNCITRAL Rules, which have been in force since their adoption by UNCITRAL and the United Nations General Assembly in 1976, were not specifically tailored to resolve investor-state disputes or


\(^8\) See Rowley, supra note 5, at 2. Realistically, the responsibilities of the general counsel of the World Bank preclude the holder of that office from focusing exclusively on the responsibilities of the ICSID Secretary-General. These responsibilities include among others, the screening of requests to commence arbitral proceedings and the authority to appoint the presiding arbitrator in cases where the parties cannot agree.

\(^9\) Id. at 1.
entertain claims for breach of customary or conventional international law. Indeed, from a procedural perspective, disputes to which a state is a party involve questions of law or public interest that are distinct from an arbitration between private commercial parties. This fundamental difference between state and commercial arbitrations has direct implications for the conduct of the arbitration. For example, there may be a need for particular procedural arrangements, such as separate phases on jurisdiction and admissibility before the submission of a statement of claim, amicus curiae briefs, and consolidation of claims and hearings. Although some BITs empower arbitral tribunals to amend the UNCITRAL Rules as necessary or directly set forth particular procedures derived from or supplementing the Rules, under the vast majority of BITs, parties and tribunals have to look for guidance outside the text of the UNCITRAL Rules in relation to such issues.

Both ICSID and UNCITRAL, therefore, have implemented or are in the process of implementing, reforms to their rules in an effort to address modern arbitral realities and ensure their continued relevance in the field of international arbitration. The purpose of this article is to present a comprehensive re-examination of the ICSID and UNICITRAL arbitration rules both from an academic perspective and as a matter of practice and procedure.

Part I of this article will first briefly consider ICSID’s history and purpose, highlight some basic provisions, and examine ICSID’s limited jurisdictional scope. Second, ICSID’s revised rules will be discussed in detail, article by article, with the old rules as a basis for comparison. “The ICSID rule changes are intended to make ICSID proceedings more streamlined and transparent, while instilling greater confidence in the arbitral process.” Although “[t]he real effect of these reforms on investor-State arbitration will depend on how they are implemented in practice,” “the changes . . . reflect a growing trend in investor-State arbitration towards increased transparency and public participation, and a greater willingness to draw inspiration from litigation-based models of dispute resolution.”

Third, notwithstanding ICSID’s application of the new rules to arbitrations effective April 10, 2006, several challenges to ICSID’s continued relevance remain. Indeed, the ICSID reforms are . . . noteworthy for what they do not include: a new appeals process. In October 2004, ICSID proposed a mechanism for appealing ICSID awards, but later abandoned the idea in the face of mounting

10. Article 1(1) of the UNCITRAL Rules refers only to “disputes in relation to [a] contract.” See UNCITRAL Rules, art. 1(1), supra note 2.  
12. Id.  
14. Id.
criticism. The debate over whether to create an appellate mechanism for ICSID awards may be revisited in the future.\textsuperscript{15} That will be when contracting states begin to lose more disputes, and particularly lose disputes that they believe were wrongly decided.\textsuperscript{16} For now, however, ICSID’s existing annulment procedure will provide the only grounds for review of arbitral awards.

Also, the effectiveness of the method for enforcing awards under ICSID will be compared to the mechanism provided under the New York Convention, which is used to enforce the awards of ICSID’s main competitor, the International Chamber of Commerce (ICC), which has an International court of arbitration.\textsuperscript{17} If ICSID’s enforcement mechanism is inadequate, then a successful claim before an arbitral tribunal could lose its financial significance. Accordingly, special consideration is given to the status of international arbitration in Latin America since

a significant portion of ICSID’s total caseload, . . . 49 percent of pending [cases] - . . . concern[s] claims against states in the Americas. None of the cases filed during ICSID’s first 30 years was against a Latin American sovereign, but since 1996 there have been 40 cases filed against Argentina, seven against Ecuador, six against Venezuela, four against Peru, three against Chile, two against Bolivia, and one each against Costa Rica, El Salvador, Honduras, Nicaragua and Paraguay. (Brazil has never consented to using the ICSID framework for disputes with foreign investors, and Mexico has consented only for NAFTA claims by US or Canadian investors, as discussed below). In most cases, the claimants have been investors from industrialised nations in Europe or the United States. But recently, . . .
Latin American investors in other Latin American countries [have also used ICSID], such as by Chilean investors against the Republics of Peru and Bolivia and by a Peruvian investor against the Republic of Paraguay. Because ICSID's Additional Facility serves as one possible venue for arbitration proceedings under NAFTA, ICSID has also been host to some 15 NAFTA claims, including 12 against Mexico and three against the United States.\(^{18}\)

Finally, ICSID must change its governing structure to ensure its continued relevance in the field of international arbitration. There is no question that ICSID is under-funded and under-staffed, particularly when its facilities are increasingly used for non-ICSID investor-state arbitrations, such as those under the UNCITRAL Rules. Such changes would be consistent with the ICSID Convention, which is extremely difficult to amend.

Part II of this article will briefly consider the UNCITRAL Rules' history and purpose, highlight some basic provisions, and examine their jurisdictional scope. The UNCITRAL Rules are intended to be acceptable in countries with different legal, social, and economic systems and are widely used in both *ad hoc* arbitrations and administered arbitrations.

Next, the main provisions in the UNCITRAL Rules that could significantly impact investor-state arbitrations will be discussed in detail and contrasted with the proposed rule changes, and other rules and processes, such as those under ICSID. UNCITRAL's future rule changes are intended to more easily resolve investor-state disputes or entertain claims for breach of customary or conventional international law, while not altering the structure of the UNCITRAL Rules' text, spirit, or drafting style, and also are intended to respect the text's flexibility rather than make it more complex.

**II. ICSID ARBITRATION RULES**

The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Convention).\(^{19}\) The executive directors of the International Bank for Reconstruction and Development (World Bank) formulated the ICSID Convention with the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help promote increased flows of international investment in development projects.\(^{20}\) The ICSID Convention entered

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19. See ICSID Convention, supra note 1.

20. ICSID is first and foremost an economic development tool. While ICSID is an "autonomous international organization" with its own governing body, the administrative council, it is still considered part of the World Bank family. Freshwater Action Network, The World Bank Group, www.freshwateraction.net/web/www_57_en.aspx (last visited Sept. 3, 2007). Indeed, "[a]ll of ICSID's members are also members of the [World] Bank. [The World Bank's] Governor sits *ex officio* on ICSID’s Administrative Council. The [ICSID Secretariat's] expenses are
into force on October 14, 1966.\textsuperscript{21} As of May 9, 2007, 144 countries have ratified the Convention.\textsuperscript{22}

The ICSID Convention and Centre provide an institutional framework for conciliation and for arbitration of disputes between private investors and host governments. Indeed, ICSID’s jurisdiction extends only “to any legal dispute arising directly out of an investment, between a Contracting State . . . or . . . any subdivision . . . and a national of another Contracting State.”\textsuperscript{23} Thus, ICSID is an attempt to institutionalize dispute resolution between states and non-state investors. It therefore always presents a “mixed” arbitration.

Recourse to ICSID conciliation and arbitration is entirely voluntary. But, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent.\textsuperscript{24} Disputes regarding jurisdiction (predicated upon disputes arising “directly out of” an investment, between a contracting state and the national of another, and written consent to submission), moreover, may be decided by the arbitration tribunal and appealed to an \textit{ad hoc} committee created from the panel of arbitrators by the administrative council of the ICSID.\textsuperscript{25} Annulment, however, is available only if the tribunal “was not properly constituted,” “exceeded its powers,” “serious[ly] depart[ed] from a fundamental rule of procedure, failed to state the reasons [for its] award,” or included a member who practiced corruption.\textsuperscript{26} Finally, all ICSID contracting states, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.\textsuperscript{27}

Pursuant to article 6(1)(a)-(c) of the ICSID Convention, the ICSID administrative council adopted regulations and rules supplementing the Convention’s provisions, generally referred to as the ICSID Regulations and Rules. They comprise:

\begin{itemize}
  \item financed out of the World Bank’s budget, although the costs of individual proceedings are borne by the parties involved. \textit{Id}.
  \item See ICSID Convention, \textit{supra} note 1.
  \item See \textit{Id.} art. 25(1).
  \item \textit{Id.}
  \item \textit{Id.} art. 52.
  \item \textit{Id.} art. 52.
  \item \textit{Id.} arts. 53(1), 27(1) (in effect empowering a private investor to enforce an ICSID award in all contracting states, not merely a state that is a party to the suit).
\end{itemize}
(i) the ICSID Administrative and Financial Regulations, which regulate the details of ICSID’s administration of conciliation and arbitration proceedings;\(^\text{28}\)

(ii) the ICSID Institution Rules, which set forth procedures for the initiation of conciliation and arbitration proceedings under the ICSID Convention;\(^\text{29}\)

(iii) the ICSID Arbitration Rules, which set forth procedures for the conduct of the various phases of an arbitration proceeding, including the constitution of the arbitral tribunal, the presentation by the parties of their case and the preparation of the arbitral award;\(^\text{30}\) and

(iv) the ICSID Conciliation Rules, which set forth similar procedures for the conduct of the conciliation proceedings.\(^\text{31}\)

In addition to providing facilities for conciliation and arbitration under the Convention, ICSID established an additional facility for administering certain disputes that do not arise directly out of an investment and for investment disputes in which one party is not a contracting state to the ICSID Convention or the national of a contracting state.\(^\text{32}\) For example, chapter 11 of the North American Free Trade Agreement governs foreign investment and provides for the resolution of investment disputes between the government of a member state and a private investor of another member state.\(^\text{33}\) These disputes may be submitted to arbitration under the ICSID Convention where the government and investors are both from member countries.\(^\text{34}\) But Canada and Mexico are not yet ICSID members, leaving the arbitration for either the ICSID Additional Facility Rules or the UNCITRAL Rules.\(^\text{35}\) Only UNCITRAL Rules are available for disputes between Mexico and Canada since neither is an ICSID member.\(^\text{36}\)

\(^{28}\) See ICSID 2006 Regulations and Rules, supra note 1, at 51.

\(^{29}\) Id., Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, at 73, [hereinafter ICSID Convention, Institution Rules].


\(^{31}\) Id., Rules of Procedure for Conciliation Proceedings, at 81, [hereinafter ICSID Convention, Conciliation Rules].

\(^{32}\) The first two NAFTA investment disputes, each involving a U.S. investor and the Mexican government, chose to use the ICSID Additional Facility Rules. See Metalclad Corp. v. United Mexican States, ICSID (W. Bank), Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2000); Azinian v. United Mexican States, ICSID (W. Bank), Case No. ARB(AF)/97/2, 39 I.L.M. 537 (1999).


\(^{34}\) NAFTA art. 1120.

\(^{35}\) See id.

The additional facility is intended for use by parties having long-term relationships of economic importance to the state party to the dispute and which involve the commitment of substantial resources on the part of either party.\(^{37}\) The facility is not designed to service disputes which fall within the ICSID Convention or that are "ordinary commercial transaction" disputes.\(^{38}\) ICSID's Secretary-General must give advance approval of an agreement contemplating use of the additional facility.\(^{39}\) The facility has its own arbitration rules,\(^{40}\) which naturally resemble the ICSID Regulations and Rules.\(^{41}\)

### A. Changes to the ICSID Rules and Regulations

The dramatic increase in arbitration under ICSID's Rules and Regulations led ICSID, in April 2006, to implement a number of reforms to its rules.\(^{42}\) The amendments "were the product of 18 months' consultation with ICSID contracting states, the business community, civil society, arbitration experts and other arbitral institutions. They are intended to make ICSID proceedings more streamlined and transparent, while instilling greater confidence in the arbitral process."\(^{43}\) As amended, the rules now provide for preliminary procedures concerning provisional measures, expedited procedures for dismissal of unmeritorious claims, access of non-disputing parties to proceedings, publication of awards, and additional disclosure requirements for arbitrators.\(^{44}\)

The new amendments of the ICSID Arbitration Rules were also made to all of the corresponding provisions of the Additional Facility Arbitration Rules, except for the section on provisional measures. This exception is explained by the difference between the ICSID Arbitration Rules and the ICSID Additional Facility Rules.
and the Additional Facility Arbitration Rules in regard to court-ordered provisional measures. Under article 46 of the Additional Facility Arbitration Rules, in contrast to the position under ICSID arbitration rule 39, it is not deemed inconsistent with the arbitration agreement for a party to seek such measures.45

1. Procedural Innovations

a. Revised Rule 39: Provisional Measures

Possibly the most significant reforms to ICSID's Rules and Regulations in 2006 (at least from the point of view of the parties) are found in rule 39 governing provisional measures. Indeed, if parties pay careful attention to the strategic considerations outlined below, they will maximize their ability to successfully protect their rights.46

The revised rule 39 allows for the submission of requests for provisional measures as soon as a dispute is registered with ICSID, even before the tribunal has been constituted.47 Under old rule 39, by contrast, parties were required to wait until the tribunal had been constituted before submitting a request for provisional measures, which could take months.48 In addition to the time needed to review and register a request for arbitration, four months or more may be required to constitute an arbitral tribunal.49

The revised rule 39 also requires ICSID's Secretary-General to impose an immediate briefing schedule, so that the issue is timely considered by the tribunal as soon as it is formed.50 At the same time, parties can still seek provisional measures from national courts, as well as the tribunal, if authorized by the applicable investment treaty or arbitration agreement.51 Such arrangements, however, are uncommon.52

The revised rule 39, therefore, allows the selection of arbitrators and the exchange of written submissions (both time consuming procedures) to run in parallel rather than in series.53 And, as revised, rule 39 allows for a deadline for briefing provisional measures, which must be completed in time for the tribunal to consider the request for provisional measures

45. Compare ICSID Additional Facility Rules, supra note 4, with ICSID Convention, supra note 1.
46. Finizio, Recent Developments, supra note 43. Provisional measures are measures of interim relief to preserve the party's rights, such as preliminary injunctions, orders preserving property or evidence, or orders requiring parties to post a security, while the arbitral proceedings are pending. See ICSID Convention, supra note 1, ICSID Convention, Arbitration Rules, at 118.
47. See ICSID Convention, supra note 1, Arbitration Rules, at 39(5).
48. Finizio, Recent Developments, supra note 43.
50. See Finizio, Recent Developments, supra note 43.
51. See ICSID Convention, Arbitration Rules, supra note 1, rule 39(6).
52. See ICSID Discussion Paper, supra note 49, at 5.
53. See ICSID Convention, Arbitration Rules, supra note 1, rule 39.
promptly upon being constituted. Notwithstanding these revisions, the process may still involve significant delays, so parties may well be advised to consider seeking provisional measures in domestic courts as well, if they are available.

i. Procedure Governing Requests for Provisional Measures

Given the significance of these revisions, it is important to understand the mechanics of revised rule 39's provisional measures process and how to effectively use that process. First, article 47 of the ICSID Convention allows a tribunal, "if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." Rule 39, however, provides a more specific framework for the request and consideration of such measures. Although rule 39 allows the tribunal to grant interim relief of its own accord, parties facing threatened harm to their interests should initiate a request for relief. Indeed, rule 39(1) allows a party to make a request for relief "at any time after the institution of the proceeding" (at any time after the ICSID Secretary-General has registered the request for arbitration).

Second, "before a tribunal may grant provisional relief, it must give both parties an opportunity to be heard." Rule 39(4), however, is vague regarding "the number and type of written submissions that the parties are entitled to file, . . . the timing of such submissions, and the process for establishing a briefing schedule." If the parties agree on a schedule, "the tribunal—or the Secretary-General under Rule 39(5)—will likely defer to the parties' agreement." Otherwise, "the tribunal must impose a schedule that is fair and meets the objectives of the rules. For example, Rule 31, which governs the exchange of written submissions on the merits, requires a memorial on the merits from the requesting party and a counter-memorial from the responding party, and then allows a reply and responsive rejoinder either at the order of the tribunal or upon agreement by the parties." This process might be cumbersome, even unavoidable, particularly when the issues are complex and the tribunal is not familiar with the facts of the case. Accordingly, "the party seeking relief should consider invoking the Rule 39(5) process immediately upon registration of its claim and file its opening observations in support of provisional measures" as soon as possible. Indeed, if a party's request for provisional measures necessitates a substantial evidentiary showing, then the party should "begin developing its case on provisional measures well before the

54. See Finizio, Recent Developments, supra note 43.
55. Id.
56. ICSID Convention, supra note 1, art. 47.
57. See ICSID Convention, Arbitration Rules, supra note 1, rule 39.
58. Finizio, Recent Developments, supra note 43.
59. ICSID Convention, Arbitration Rules, supra note 1, rule 39(1). See also ICSID Convention, Institution Rules, supra note 1, rule 6(2).
60. Finizio, Recent Developments, supra note 42.
dispute is registered at ICSID.

Third, rule 39(2) requires tribunals to rule on a request for provisional measures before devoting substantial time to complicated jurisdictional questions. "Where a request is particularly urgent, parties may ask the tribunal to streamline both the number of written submissions and the time allowed for such submissions so that a decision can be made expeditiously." A tribunal might quickly grant 'temporary relief on a tight briefing schedule in the face of genuine urgency, and then . . . revisit the issue later under Rule 39(3), which allows the tribunal to ‘at any time modify or revoke its recommendations.'

Lastly, “although the ICSID Convention and the ICSID Rules” do not explicitly grant a tribunal the coercive authority to enforce provisional measures against a party, “the weight of ICSID authority treats compliance with provisional measures as mandatory.” A tribunal, moreover, “can take a party’s failure to comply with provisional measures into consideration when fashioning an ultimate award, for example, by adjusting the amount of damages or imposing other forms of permanent injunctive relief.”

**ii. Grounds for Granting Requests for Provisional Measures**

ICSID case law presents a range of “grounds that ICSID tribunals have relied on in granting requests for provisional relief:” “[p]reventing irreparable” harm or damage; “[p]reventing aggravation of the dispute;” “[p]reserving the tribunal’s ability to issue a final award;” and “[e]njoining parallel proceedings” pursuant to article 26 of the ICSID Convention. Also, the need for provisional measures must be urgent and necessary to preserve the status quo.

“Rule 39(1) requires parties to demonstrate ‘the circumstances that require such [provisional] measures.’ For example, to prove irreparable harm, a party must demonstrate that the harm they suffered cannot be compensated-for by damages. Also, to show urgency, a party must demonstrate some likelihood that the threatened injury could occur

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61. Id.
62. Id. (internal citations omitted).
63. Id., citing Maffezini v. Spain, ICSID (W. Bank), Case No. ARB/97/7, ¶ 9 (1999). The arbitration rule 47 refers to a tribunal’s ability to “recommend” provisional measures. ICSID Convention, Arbitration Rules, supra note 1, rule 47.
64. Id., citing MINE v. Guinea, ICSID (W. Bank), Case No. ARB/84/4 (1988) (reducing award to reflect expenses incurred by losing party because of winning party's violation of ICSID Convention).
65. Id. Article 26 of the ICSID Convention provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” ICSID Convention, supra note 1, art. 26.
66. Finizio, Recent Developments, supra note 43 (internal citation omitted).
67. See id., citing Plama Consortium Ltd v. Bulgaria, Order, ICSID (W. Bank), Case No. ARB/03/24, ¶ 46 (2005). In the private commercial arbitration context, however, a showing of serious injury sometimes satisfies ‘irreparable injury,’ whether technically reparable or not. Id.
before a final award can be issued.\textsuperscript{68}

\textit{iii. Other Considerations}

"[P]arties may need to show a prima facie case for jurisdiction before a tribunal will issue provisional measures in their favour."\textsuperscript{69} In addition, parties generally are not required "to demonstrate a likelihood of success on the merits as a prerequisite for obtaining provisional measures."\textsuperscript{70} "Indeed, in [Maffezini v. Spain, the tribunal] held that it 'should avoid 'pre-judging' the merits of the dispute when resolving a request for provisional measures.'"\textsuperscript{71} Parties, nevertheless, should still present a "succinct" and "persuasive" "case for relief along with any request for provisional measures."\textsuperscript{72} A tribunal is more likely to "grant provisional measures where the claimant's case appears unpersuasive on its face," than not.\textsuperscript{73}

\textit{iv. Conclusion}

Time will tell whether ICSID's April 2006 amendments make ICSID proceedings more streamlined and transparent. At a minimum, ICSID's revised rules governing provisional measures are significantly more attractive as a route for parties facing an urgent need for relief at the start of investor-state arbitration proceedings.

\textit{b. Revised Rule 41: Preliminary Objections}

Article 36(3) of the ICSID Convention grants the Secretary-General the responsibility of screening requests for arbitration.\textsuperscript{74} This screening power, however, does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful. Indeed, ICSID's Secretary-General can only refuse to register a request for arbitration if, on the basis of the information contained in a request for arbitration under the ICSID Convention, the dispute is manifestly outside ICSID's jurisdiction.\textsuperscript{75}

The Secretary-General's limited screening power, and the increase in the number of ICSID cases, forced ICSID to revise rule 41.\textsuperscript{76} The revised

\begin{itemize}
\item \textsuperscript{68} Tokios Tokeles v. Ukraine, ICSID (W. Bank), Case No. ARB/02/18, ¶ 8 (2003).
\item \textsuperscript{69} Finizio, \textit{Recent Developments}, supra note 43. Jurisdiction is predicated upon disputes arising "directly out of" an investment, between a contracting state and the national of another, and written consent to submission to arbitration under ICSID. See ICSID Convention, \textit{supra} note 1, art. 25.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id. See also Maffezini, ICSID (W. Bank), Case No. ARB/97/7, ¶ 21.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} See ICSID Convention, \textit{supra} note 1, art. 36(3).
\item \textsuperscript{75} See ICSID Convention, \textit{supra} note 1, art. 36. After a request for arbitration is registered, the parties are invited to proceed to constitute the arbitral tribunal. Registration, however, does not prejudice the powers and functions of the arbitral tribunal in regard to jurisdiction and the merits of the dispute. Once constituted, the tribunal may dismiss the claim on the merits or for lack of jurisdiction. If the tribunal considers the claim to have been frivolous, it may also award costs to the respondent. ICSID Discussion Paper, \textit{supra} note 49, at 6-7.
\item \textsuperscript{76} Id.
\end{itemize}
rule 41 (with a new paragraph (5)) permits the tribunal, at its discretion, to dismiss all or part of a claim on the merits at the request of a party on an expedited basis. A party, however, must file an objection that a claim is manifestly without merit within thirty days of the creation of the tribunal and before the tribunal's first session to obtain an expedited review. Moreover, the denial by the tribunal of a party's request does not prejudice other objections the party might make. Similar changes were made to the corresponding provisions in article 45 of the Additional Facility Rules.

2. Greater Transparency and Public Participation

a. Revised Rule 32: The Oral Procedure

In certain cases, it could be useful to open hearings to persons other than those directly involved in the proceeding. Open hearings would provide the public with greater transparency of ICSID's investor-state arbitration process. To accomplish this goal, ICSID revised rule 32. The revised rule 32 allows the tribunal to permit persons besides the parties, their agents, etc. to attend the hearings or even open them to the public, without the consent of both parties, provided it considers the views of the disputing parties and consults with the Secretariat. Under old rule 32, the tribunal could allow other persons to attend the hearings only with

78. *See ICSID Convention, Arbitration Rules, supra* note 1, rule 41(5).
79. *Id.*
80. *See ICSID Working Paper, supra* note 77, at 8. Interestingly, the U.S. in its post-NAFTA free trade agreements has included a provision that requires the tribunal to decide preliminary issues at the outset of the dispute rather than joining them to the merits on an expedited basis. For example, the U.S.-Chile FTA, article 10.19, permits a respondent to raise an objection that a dispute is not within a tribunal's competence. As such, upon receipt of an objection, the tribunal must, as a preliminary matter, suspend any proceedings on the merits and consider the objection. Where a request is made for a decision on an expedited basis, a decision on the objection must be issued within 150 days of the request (160 if there is a hearing, and 180 if the tribunal shows "extraordinary cause"). Additionally, the Chile FTA authorizes the tribunal to award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

82. *See ICSID Working Paper, supra* note 77, at 10. See also ICSID Convention, Arbitration Rules, supra note 1, rule 32(2).
the consent of the parties. In addition, the revised rule 32 requires the tribunal, when necessary, to prescribe procedures to protect proprietary information and make the appropriate logistical arrangements. This is consistent with article 48(5) of the ICSID Convention, which prohibits ICSID from publishing an "award without the consent of the parties." Similar changes were made to the corresponding provisions in article 39(2) of the Additional Facility Rules.

b. Revised Rule 37: Visits and Inquiries; Submissions of Non-disputing Parties

Amicus participation is clearly desirable in investor-state dispute settlement proceedings, as it provides not only non-governmental organizations, but also business groups, whose values and interests are implicated in the dispute, an opportunity to directly state their points of view. In

83. See ICSID Convention, Arbitration Rules, supra note 1, rule 32(2).
84. ICSID Convention, supra note 1, art. 48.
85. ICSID Additional Facility Rules, supra note 4, art. 39(2).
86. See ICSID Discussion Paper, supra note 49, at 9. It should be noted, however, that the authority to accept amicus briefs in disputes under trade agreements is one of the most controversial aspects of dispute resolution since it raises several procedural issues, including how to deal with potentially dozens of amicus briefs in a particular case, thereby taxing an already limited resource for dispute settlement, and whether the admission of amicus briefs is a step toward participation in oral proceedings. Indeed, the World Trade Organization’s (WTO) dispute settlement body (DSB) has been grappling with these questions for years. Jeffrey L. Dunoff, The WTO’s Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution, 13 Am. Rev. Int’l Arb. 197 (2002). In the Shrimp/Turtle case, the appellate body (AB) reversed the panel’s ruling that it did not have the authority to accept amicus submissions from non-governmental entities. See Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 110, WT/DS58/AB/R (Oct. 12, 1998). The panel had considered that since it had a right to ‘seek’ information from any person pursuant to article 13 of the Dispute Settlement Understanding (DSU), it was prohibited from considering non-requested information. The AB held that the reading of the word ‘seek’ as a prohibition of this kind ignored the context, which was a very broad grant of fact-finding authority to the panel in order that the panel could discharge its article 11 obligation to make an ‘objective assessment of the facts.’ Id. ¶¶ 107, 108. The AB went on to find that the combined scope of article 12 (which allows a panel to create its own procedures, deviating from the default procedures in appendix 3 of the DSU) and article 13 gives panels broad procedural discretion in how they discharge their duty under DSU article XI “to make an objective assessment of the matter . . . including an objective assessment of the facts of the case and conformity with the relevant covered agreements.” Id. ¶ 106 (emphasis in original). Panels in a number of disputes since have considered amicus submissions by non-governmental organizations. In the Asbestos case, the AB set out a special procedure according to which entities would apply for leave to submit a brief to the AB. Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 52, WT/DS135/AB/R (Mar. 12, 2001); Communication from the Appellate Body, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/9 (Nov. 8, 2000). According to the special procedure an application must, inter alia, disclose the nature of the entity applying for leave, its interest in the case, and whether it is being financed or supported by the parties. Also, the applicant would have to explain, briefly, how its submission would help the AB decide the case, going beyond the arguments the parties themselves could be expected to make. Far from assuaging due process and related concerns, however, the special procedure in Asbestos provoked a viru-
deed, in the ICSID Convention arbitration proceedings initiated against Argentina regarding water services concessions, the arbitral tribunal in 2005 affirmed its power to accept and consider written submissions from interested third parties. According to ICSID, revised rule 37 to allow for amicus briefs. Indeed, ICSID tribunals may now accept and consider written submissions from a non-disputing person or state, but only after consulting with both parties. But, the tribunal must be satisfied that a submission by a non-disputing party would be helpful in the determination of a factual or legal issue within the scope of the dispute, that the non-disputing party has a significant interest in the dispute, and that the amicus submission would not disrupt the proceeding or unfairly burden either party. Still, it is unclear how the tribunal would deal with potentially dozens of amicus briefs in a particular case. The requirement that amicus briefs not disrupt the arbitral proceeding may grant the tribunal the ability to limit the number of amicus submissions it accepts. Similar changes were made to the corresponding provisions in Article 41 of the Additional Facility Rules.

c. Revised Rule 48: Rendering of the Award

Prompt publication of awards issued at ICSID has become particularly important in light of the increase in the number of ICSID cases, as many cases involving similar issues are pending. In order to facilitate the timely publication of awards by making their early publication mandatory, the ICSID revised rule 48. Article 48(5) of the ICSID Convention and the first sentence of the revised rule 48(4) provide that...
SID shall not publish an award without the consent of the parties. If ICSID does not have the required consent of both parties for publication of the full text of the award, and it is not published by another source, ICSID must promptly publish excerpts of the legal conclusions of the tribunal. Similar changes were made to the corresponding provisions in article 53(3) of the Additional Facility Rules.

The old rule 48, by contrast, authorized, but did not require, ICSID to publish excerpts from the awards. In addition, there was no provision as to the timeliness of publication of excerpts of the main holdings while ICSID waited to receive the consent of both parties for it to publish an award, which occasionally took several months.

3. Rules Governing Arbitrators

a. Revised Rule 6: Constitution of the Tribunal

Expanding the disclosure requirements for arbitrators has become particularly important with the large number of new cases being registered by ICSID and the increased scope for possible conflicts of interest. Accordingly, ICSID revised rule 6. These changes were designed to ensure an arbitrator's impartiality and independence. Indeed, the revised rule 6 requires the arbitrator to disclose, not only any past or present relationships with the parties, but also any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment. Under the former rule 6, by contrast, the arbitrator was only required to disclose any past or present professional, business, and other relationships (if any) with the parties.

The revised rule 6 also extends the period of time over which disclosures are to be made, by requiring that the obligation be continuous throughout the entire proceeding, not just at its commencement. The

94. See ICSID Convention, supra note 1, art. 48(5); ICSID Convention, Arbitration Rules, supra note 1, art. 48(4).
95. See ICSID Convention, Arbitration Rules, supra note 1, rule 48(4).
96. See ICSID Additional Facility Rules, supra note 4, rule 53(3).
98. Id. at 12. Articles 14(1) and 40(2) of the ICSID Convention require all ICSID arbitrators to be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. See ICSID Convention, supra note 1, arts. 14(1), 40(2).
100. See ICSID Convention, Arbitration Rules, supra note 1, rule 6(2).
102. Id. at 13. The NAFTA Code of Conduct for Dispute Settlement Procedures under chapters 19 and 20 similarly requires the disclosure of "any interest, relationship or matter" that could affect an arbitrator's independence or impartiality or that "might reasonably create an appearance of impropriety or an apprehension of bias." NAFTA Secretariat, Code of Conduct for Dispute Settlement Procedures Under Chapters 19 and 20 of the North American Free Trade Agreement, at 19 A (1), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=1 (look under "Legal Texts") (last visited Sept. 20, 2007). The obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the
declarations are then transmitted by ICSID to the arbitrators and to the parties. Similar changes were made to the corresponding provisions in article 13(2) of the Additional Facility Rules.

b. Revised Regulation 14: Direct Costs of Individual Proceedings

Pursuant to ICSID’s administrative and financial regulation 14, the Secretary-General sets standard daily fees for members of conciliation commissions, arbitral tribunals, and annulment committees. But, in accordance with article 60(2) of the Convention, the parties and the commission, tribunal, or committee may agree on a different rate of remuneration than the standard fee. ICSID, therefore, revised regulation 14 clarifying that requests for increases in the applicable rate will only be made in exceptional circumstances and must be made through ICSID. This resulted from situations where tribunal members objected at the outset to ICSID’s standard rate of $350 an hour and asked for much more, sometimes $500-$600 an hour. Revised regulation 14 presumably makes it much more difficult for arbitrators to make such demands.

4. Conclusion

By creating new mechanisms for interim measures of relief, motions to dismiss, amicus briefs, publication of awards, and arbitrator disclosure, ICSID is striving to produce a more robust system for adjudicating investor-state disputes. Although the changes are incremental, they reflect a growing trend in investor-state arbitration towards increased transparency and public participation, and a greater willingness to draw inspiration from litigation based models of dispute resolution. The real effect of these reforms on investor-state arbitration will depend on how they are implemented in practice. Investors and corporate counsel are well advised to keep informed about these developments as they consider investor-state arbitration as a means of resolving disputes with government entities.

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103. ICSID Convention, Arbitration Rules, supra note 1, rule 6.
104. ICSID Additional Facility Rules, supra note 4, art. 13(2).
105. ICSID Convention, Arbitration Rules, supra note 1, regulation 14.
106. Id. art. 60(2).
107. Id. regulation 14.
108. See Born, supra note 13.
B. The Future?

1. Appellate Review of ICSID Arbitral Awards

The revised ICSID rules are also noteworthy for what they do not include: a new appeals process. In October 2004, ICSID’s Secretariat proposed an appellate mechanism to be located at ICSID.\textsuperscript{110} According to the ICSID Discussion Paper, efficiency and economy, as well as coherence and consistency in ICSID case law, would best be served by ICSID offering a single appeal mechanism as opposed to multiple treaty-based mechanisms.\textsuperscript{111} The paper further asserted that the appeals facility would expand the scope of review of ICSID awards from any of the five grounds for annulment of an award set out in article 52 of the ICSID Convention, to also include review of the substantive correctness of an award.\textsuperscript{112}

On May 12, 2005, however, the appeals facility was shelved for further study as “it [would be] premature to attempt to establish such an ICSID mechanism.”\textsuperscript{113} Apparently, the contracting states, particularly capital-exporting states and the investors they represent, valued the high degree of finality the current ICSID arbitration process provides parties in resolving disputes more than the benefit of substantive consistency.\textsuperscript{114} Indeed, the finality of ICSID awards is central to ICSID’s purpose of acting as a neutral venue providing an effective remedy for investors. Article 53 of the ICSID Convention dictates that an ICSID award is “binding on the parties and shall not be subject to any appeal.”\textsuperscript{115} Article 54, moreover, requires contracting states to recognize and enforce ICSID awards as if they were final judgments of their local courts.\textsuperscript{116} Thus, by equating ICSID awards to domestic judgments, as opposed to foreign, ICSID eliminates all review. In this respect the ICSID enforcement mechanism seems much more efficient than the regime under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,\textsuperscript{117} which provides both procedural and substantive excep-
tions to the recognition of an arbitral award. Consequently, investors and contracting states will probably only embrace substantive review of ICSID awards when they begin to lose more disputes, particularly those disputes they perceive to have been wrongly decided. Meanwhile, ICSID's existing annulment procedure will continue to provide limited grounds for review of awards, including whether the tribunal was properly constituted, manifestly exceeded its powers, or was corrupt.

In addition, an appellate mechanism, as opposed to the current annulment procedure, would raise difficult technical and policy issues. For example, ICSID arbitrations would in some instances be subject to the mechanism and in other cases not. Also, as discussed below regarding the United States, many countries are concluding treaties that envisage the eventual creation of appeal mechanisms and the creation of an ICSID appeals facility would only add to the number of appeal mechanisms.

Noteworthy is the advent of the United States as a defendant in NAFTA chapter 11 investor-state disputes, causing the United States to become the first capital-exporting state to break with investors' interests. The United States now evaluates foreign investment law in both an offensive and defensive light. Indeed, the U.S. Congress' decision in the U.S. Trade Act of 2002 reflected Congress' fear that the United

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118. New York Convention, art. V. Article V of the New York Convention sets forth exclusive exceptions to recognition of an arbitral award: invalidity of the arbitral agreement; a violation of due process; procedural irregularities; non-arbitrability of the dispute; violation of public policy; or failure of the award to become binding, or its suspension or setting aside in the country where the award was made. Pursuant to the last defense, moreover, a successful appeal of an award in the issuing state can prevent its enforcement abroad. Specifically, under article V, section 1(e) of the New York Convention, a court can refuse recognition and enforcement of an award when "the award ... has been set aside or suspended by a competent authority of the country in which that award was made." Id. art. V.1(e). Therefore, if the scope of judicial review in a rendering State extends beyond the New York Convention's other defenses, then the losing party's opportunity to avoid enforcement is automatically enhanced. Kolkey, D., Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitration Awards, 22 INT'L LAW. 693 (1988).

119. See Walsh, supra note 16.

120. ICSID Convention, supra note 1, art. 53.

121. See Gantz, supra note 114.


123. See Walsh, supra note 16.
States was about to lose one or more NAFTA disputes.\textsuperscript{124} This decision encouraged agreement on substantive, as well as procedural, review of awards from disputes arising under future trade agreements, which now include the Chile Free Trade Agreement, and the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), among others.\textsuperscript{125} The Chile FTA at Annex 10-H provides: "Within three years after the date of entry into force of the Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.\textsuperscript{126}

CAFTA-DR, moreover, offers more detailed guidelines on developing an appellate mechanism, possibly because of Congressional dissatisfaction with the bare-bones formulation of the Chile FTA and its lack of a short deadline for negotiations:

1. Within three months of entry into force of the Agreement, the [Fair Trade] Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the negotiating Group to take into account the following issues, among others:
   a) the nature and composition of an appellate body or similar mechanism;
   b) the applicable scope and standard of review;
   c) transparency of proceedings of an appellate body or similar mechanism;
   d) the effect of decisions by an appellate body or similar mechanism;
   e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and
   f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

2. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. Upon approval of the draft amendment by the Parties, in accordance

\begin{itemize}
  \item[126.] Chile FTA, \textit{supra} note 80, annex 10-H.
\end{itemize}
with Article 22.2 (Amendments), the Agreement shall be so amended.\textsuperscript{127}

"Once the CAFTA-DR enters into force [fully], a one-year negotiating process that may result in some sort of an agreement contemplating the establishment of an appellate mechanism will trigger after 90 days, at least for the seven CAFTA-DR partners."\textsuperscript{128}

Whether the CAFTA-DR nations will conclude negotiations regarding the appellate mechanism within one year of the agreement going fully into effect is open to speculation.

Those in the U.S. Congress who supported the concept of an appellate mechanism in the TPA legislation of 2002, but opposed CAFTA-DR in 2005, cannot be expected to support an amendment to CAFTA-DR to establish an appellate mechanism. [Therefore, even with] prompt agreement on an appellate mechanism by the CAFTA-DR parties in the mandated negotiations it could take years (if at all) before the CAFTA-DR is amended and even longer before the first case reaches the appellate mechanism.\textsuperscript{129}

Another example of the United States’ defensive posture regarding foreign investment law is found in the so-called compromise between the U.S. Trade Representative’s Office and the Democratic party leadership where it was agreed that there would be language (presumably in the preamble of the newer FTA investment chapters) stating that “foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than those accorded United States investors” under the U.S. Constitution.\textsuperscript{130}

2. Threat of Non-enforcement of ICSID Arbitral Awards in Latin America

Although ICSID’s automatic enforcement mechanism is more effective than the regime under the New York Convention, article 54 does not re-

\begin{footnotes}
\item 127. Central America-Dominican Republic Free Trade Agreement, annex 10-F, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/section_Index.html [hereinafter CAFTA-DR]. While CAFTA-DR was scheduled to enter into force January 1, 2006, for all seven members (United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), this did not occur. The U.S. Trade Representative’s Office announced on December 30, 2005, that CAFTA-DR would be implemented on a rolling basis, and that the United States would “continue to work intensively with CAFTA-DR partners to bring them on board as quickly as possible.” Press Release, Office of the United States Trade Representative, Statement of USTR Spokesman Stephen Norton Regarding CAFTA-DR Implementation (Dec. 30, 2005), http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html (look under “Press Releases”). As of April 1, 2007, the agreement had entered into force for El Salvador, Guatemala, Honduras, Nicaragua, and the United States.
\item 128. Gantz, supra note 114, at 47.
\item 129. Id. at 75.
\end{footnotes}
quire contracting states to enforce awards if under national law final judgments could not be so executed. In addition, ICSID, like all other international bodies, lacks institutional remedies against a non-complying state. Consequently, the ICSID tribunal must rely on contracting states to enforce an award within the framework of their national laws on sovereign immunity and existing treaty obligations. This reliance on national courts is problematic. Economic crisis has occurred in Latin America, and specifically Argentina, and political instability can easily shift a state’s priority from foreign investment protection to satisfaction of local interests, negatively impacting the attitude of domestic courts toward international arbitration.

Latin American jurisdictions—notwithstanding the region’s traditional hostility towards international arbitration embodied in the Calvo Doctrine—have engaged in extensive bilateral commitments to encourage foreign direct investment in, among others, the energy and telecommunications industries. Argentina, Chile, Columbia, Costa Rica, Ecuador, Guatemala, Honduras, Panama, Paraguay, Peru, and Uruguay ratified the ICSID Convention. Bolivia, Nicaragua, and Venezuela also ratified the Convention, but later withdrew. Latin American countries that have ratified BITs with other nations include Argentina (54 BITs), Chile (38 BITs), Ecuador (23 BITs), Mexico (18 BITs), Peru (28 BITs), and Venezuela (21 BITs). Additionally, Chile, Mexico, Peru, Colombia, and the Central American countries have signed free trade agreements with the United States, all providing for investment arbitration.

But economic instability in the region has had unexpected consequences for the rights of foreign investors to arbitrate investment disputes. Indeed, the Calvo Doctrine and intimations are reawakening.

131. ICSID Convention, supra note 1, art. 54(3).
132. See Paul Blustein, And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina (2005).
133. Bernardo M. Cremades, Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues, 59 Disp. Resol. J. 78, 80 (2004). Latin American jurisdictions traditionally embraced the Calvo Doctrine (named after the Argentinean diplomat Carlos Calvo), which espoused nonintervention in Latin American affairs and absolute equality of foreigners and Latin American nationals by providing that foreigners could only seek redress for grievances before local courts. “The Calvo Doctrine gave rise to the Calvo Clause, which precluded arbitration and instead required disputes to be resolved in national courts. Latin American countries and State-owned companies included a Calvo Clause in their investment contracts and agreements with foreign investors.” Id.
134. See ICSID Contracting States, supra note 22.
135. See Withdrawal from ICSID, supra note 22.
136. Cremades, supra note 133, at 81-82. “[N]ot all of Latin America followed suit.” For example, “Brazil has only assumed regional investment obligations under the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR.” Brazil, moreover, has not ratified the ICSID Convention or any other international investment treaty providing for international arbitration. Id.
137. See Cremades, supra note 133, at 81-82.
138. Mexico’s experience with the Calvo Clause was also problematic to the NAFTA negotiations of investment provisions. Indeed, Mexico was one of the Latin Amer-
"For example, Argentina, which is currently named as a respondent in 29 pending ICSID arbitrations resulting from the government’s 2002 emergency monetary policy freezing local tariffs and abolishing U.S. dollar-to-Peso convertibility, has sought to suspend these arbitrations." 139 Actually, in CMS Gas Transmission Company v. Argentine Republic, 140 CMS sought to recover under the U.S.-Argentina BIT for losses it suffered following Argentina’s suspension of a tariff regime applicable to a privatized gas transportation company, Transportadora de Gas del Norte (TGN), in which it had an investment. Argentina argued, inter alia, “that the ICSID tribunal lacked jurisdiction because TGN’s license for the transportation of gas called for disputes to be settled before a Federal Court of Buenos Aires, which precluded any other forum from having jurisdiction.” 141

The tribunal, however, held that the ICSID tribunal had jurisdiction over the dispute and that CMS was not bound by Argentina’s licensing agreement with TGN. [In addition] even if CMS had been a party, “referring certain kinds of disputes to the local courts... is not a bar to the assertion of jurisdiction by an ICSID tribunal under the [BIT], as the functions of these various instruments are different.” 142 Subsequently, Argentina filed for annulment and requested a stay of the enforcement of the award until the application for annulment was decided. 143

Argentina also launched a campaign against the validity of BIT provisions providing for arbitration administered by ICSID, and the finality of ICSID awards. 144 Indeed, Argentina advocated “that local courts regain control over all cases where international tribunals are involved” and bring disputes with foreign investors back within Argentina’s jurisdiction. 145 “In particular... Argentina stud[jed] the possibility of returning

139. Cremades, supra note 133, at 81. “Additional cases against Argentina—currently in amicable consultations—could be filed in the near future due to breach of commitments with foreign investors.” Id. at 81 n.8.
141. Cremades, supra note 133, at 83. CMS Gas, Case No. ARB/01/8, ¶¶ 1, 70.
142. Id. ¶ 76.
145. Cremades, supra note 133, at 81 (internal citations omitted). Argentina’s attorney general’s office in charge of the country’s defense at ICSID advanced the argument that ICSID arbitration is unconstitutional based on the fact that eventual
the jurisdiction of national courts in order to ensure that investors exhaust all legal domestic remedies, and the possibility of review of awards of international tribunals by Argentinean courts."

On September 1, 2006, however, the ICSID tribunal, in its decision ordering the stay of enforcement of the CMS award, noted that Argentina, through the attorney general, in a letter dated June 12, 2006 provided "an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the arbitral tribunal in this proceeding as binding and will enforce any pecuniary obligations imposed by that award within its territories, in the event annulment is not granted." The tribunal concluded that the attorney general's letter "should dispel any doubts that CMS may have legitimately had in the past [since it] irrevocably commits Argentina to pay any pecuniary obligations enforced upon it under the award."

The Argentine government's turnaround regarding international arbitration, as shown through the attorney general's letter, raises hopes that Argentina will live up to its international duties in all cases submitted to ICSID arbitration and will not require the review of an ICSID award by local courts. It remains to be seen, however, whether Argentina will generally agree to abide by adverse rulings on the merits or try to resist them, either by annulment proceedings before ICSID itself or by simple non-payment of awards.

Venezuela is another country in which the status of international arbitration is changing. Although the Venezuelan Supreme Court rendered a milestone decision in the Exploration Round Case, upholding the arbitrability of disputes arising out of oil exploration contracts concluded by the Venezuelan-owned oil company Petróleos de Venezuela S.A. (PDVSA) and various foreign investors in August 1999, President Hugo Chávez issued a decree on February 26, 2007, forcing private oil companies to hand control of their Venezuelan businesses to PDVSA, stating that Venezuelan law will govern all the "facts and activities related to this decree-law," and that disputes will be subject to the jurisdiction of Venezuelan courts "in the manner provided by the Constitution of the

awards issued against the Republic would not be subject to judicial review. Since Argentina's constitution subordinated international treaties to overarching public law principles, its consent to ICSID did not encompass review of sovereign decisions to safeguard essential public interests, such as restructuring and stabilizing the national currency system, but was limited to disputes of a purely commercial nature. See Carlos E. Alfaro & Pedro Lorenti, *Argentina vs. ICSID: Unconstitutionality of the BITs and ICSID Jurisdiction—the Potential New Government Defenses Against the Enforcement of the ICSID Arbitral Award—Issues That May Subject the Award to Revision by the Argentine Judiciary*, (Alfaro-Abogados 2005), http://www.mondaq.com/article.asp?articleid=32539.

146. *Id.* (internal citations omitted).
147. *CMS Gas*, Case No. ARB/01/8, ¶ 28, supra note 141.
148. *Id*. ¶ 50.
Bolivarian Republic of Venezuela.”¹⁵⁰ Venezuela’s move to exert more control over foreign oil companies operating in its territory (including BP, Exxon Mobil, Chevron, ConocoPhillips, Total and Stat Oil) suggested possible new waves of ICSID cases.¹⁵¹ Venezuela, along with Bolivia and Nicaragua, will no longer participate in ICSID. At the recent President’s Summit for the Bolivarian Alternative for the Americas (ALBA), a leftist trade bloc, Venezuela “emphatically” reject[ed] the impositions and pressures from “transnational companies that . . . resist the application of decisions by their countries’ sovereign governments. These companies rather threaten to initiate international legal proceedings and arbitration processes using mechanisms such as the ICSID.”¹⁵²

These attacks on international arbitration, along with Argentina’s wa- vering attitude towards international arbitration, signal a regional trend in the interference with the autonomy of arbitration. Argentina, Venezuela and other developing nations, however, must consider the risk calculus in deciding whether to comply with ICSID or not. Despite ICSID’s aforementioned enforcement drawbacks, a state’s non-compliance may lead to a loss of its credibility in the international business community. Moreover, as a member of the World Bank family, ICSID enjoys a distinct advantage over the New York Convention enforcement mechanisms: the possibility of withdrawal of official World Bank and IMF aid,


¹⁵¹ On May 1, 2007, BP, Chevron, Exxon Mobil, France’s Total, and Norway’s Stat Oil agreed—in principle—to hand over 60 percent of their assets to PDVSA. The companies have until June 26, 2007 to negotiate the terms of the new contracts. Eni-Daci6n, an oil company operating in Venezuela’s Orinoco belt, has registered a billion-dollar claim against Venezuela at ICSID. See Venezuelan Oil Companies Face Moment of Truth, GLOBAL ARB. REV., May 4, 2007, http://www.globalarbitrationreview.com/news/article/3794/venezuelan-oil-companies-face-moment-truth/.

¹⁵² See Withdrawal from ICSID, supra note 22. Simply withdrawing from ICSID does not necessarily close the door on facing expropriation cases. Indeed, a number of other treaties, including BITs, would need to be revised or reversed for Venezuela, Bolivia, or Nicaragua to enjoy an ICSID-free future. In addition, many of the investment treaties have survival clauses, which allow for further claims. Accordingly, Bolivia intends to renegotiate its BITs one at a time, as they expire. Id. Many of Bolivia’s BITs are in force for 10 years, after which either country can choose to end the treaty. If the original 10-year period elapses without notice to terminate, then the BIT remains in force in one of two ways. Some BITs are renewed for 6 or 10-year periods and can only be terminated if notice is given in advance of the end of one of those periods. Other BITs, such as the Bolivia-United States agreement are renewed indefinitely and can be terminated at any time after the initial 10-year time-span, given one year’s notice. Most of Bolivia’s BITs also contain . . . survival clause[s], which ensure that most of the protections offered in the BIT will continue to apply to investments made prior to the termination of the treaty, for 10 to 20 years after that termination date. Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions, INVESTMENT TREATY NEWS, May 9, 2007, ¶¶ 7-8, http://www.bilaterals.org/article.php3?id_article=8221.
especially in the form of largely subsidized funds.\textsuperscript{153}

3. \textit{The Need for a Full-Time Leader}

As previously noted, despite ICSID’s growing caseload, ICSID has not changed structurally since its creation forty years ago. Indeed, ICSID remains small, staffed by about a dozen lawyers, with the general counsel of the World Bank serving as its part-time Secretary-General.\textsuperscript{154} Consequently, ICSID has struggled to maintain an efficient, highly technical investor-state arbitration process.\textsuperscript{155} Commentators question whether ICSID “has the financial backing, governmental support and ‘ICSID-arbitration focused’ senior management required to fulfill its growing responsibilities.”\textsuperscript{156}

Although the ICSID Convention dictates how to operate ICSID, some things are flexible, including how ICSID is financed. Currently the World Bank provides ICSID’s budget largely as a matter of convenience.\textsuperscript{157} The exact mechanism provided by the Convention (requiring direct contributions from contracting states, linked to fractions of other contributions)\textsuperscript{158} may be difficult to implement. Still, there could be room for maneuver. Likewise, the only apparent limit to the Secretariat’s size, including administrative staff, is ICSID’s present budget, which is rather small compared to the bank’s overall group.

ICSID and the World Bank are linked in other ways. The ICSID Convention gives the president of the World Bank key roles in certain situations, such as challenges to ICSID tribunal arbitrators. Also, the bank’s general counsel traditionally serves as ICSID’s Secretary-General.\textsuperscript{159} This connection is useful in that it ensures a hot line to the president of the World Bank.\textsuperscript{160} ICSID’s affiliation with the World Bank also lends credibility in the eyes of the contracting states. But, there is a downside. ICSID’s titular head has by definition another more important job; he or she can only ever give ICSID attention part-time. Yet it seems self-evident that ICSID should have an executive managing it full-time. For many years, the general counsel or Secretary-General had the luxury of being able to delegate to Antonio Parra, ICSID’s deputy director, who became ICSID’s de facto manager in 2000.\textsuperscript{161} Parra ran the daily details, but kept his executive in the loop. Parra, however, left in 2005. Since

\textsuperscript{153} See Ibrahim F. I. Shiata, \textit{Towards a Greater Depoliticization of Investment Dis-\textsubscript{p}utes: The Roles of ICSID and MIGA}, 1 ICSID REV. FOREIGN INVESTMENT L.J. 1, 115-16 (1986). See generally Stewart Shackleton, \textit{Footing the Bill}, LEGAL WEEK GLOBAL, Jan. 24, 2003 (stating that investments covered by international law and BITs include most forms of business assets that foreign investors may undertake).

\textsuperscript{154} Rowley, \textit{supra} note 5, at 1.

\textsuperscript{155} Id.

\textsuperscript{156} Id.


\textsuperscript{158} See ICSID Convention, \textit{supra} note 1, regulation 18.

\textsuperscript{159} Samuels, \textit{supra} note 157, at 12.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 14.
then, Margrete Stevens has played the senior internal role. “ICSID users seem impressed with Stevens, whom they find knowledgeable, diplomatic and above all a good manager. But in the sense of job titles, since Parra left there has been a vacuum to fill.”

III. UNCITRAL ARBITRATION RULES

In 1976, the UNCITRAL issued the Model International Commercial Arbitration Rules (UNCITRAL Rules). The UNCITRAL Rules are intended to be acceptable in countries with different legal, social and economic systems. The UNCITRAL Rules are widely used in both ad hoc arbitrations as well as administered arbitrations. Indeed, unlike the ICSID Rules, the UNCITRAL Rules are not identified with any national or international arbitration organization. Parties to a contract may agree to use the UNCITRAL Rules to guide the resolution of commercial disputes arising between them. Nothing in the Rules limits their use to nationals of states that are member states of the Commission or even to members of the United Nations.

Among other things, the UNCITRAL rules provide that an “appointing authority” shall be chosen by the parties or, if they fail to agree upon that point, shall be chosen by the Secretary-General of the Permanent Court of Arbitration at the Hague (comprised of a body of persons prepared to act as arbitrators if requested). The UNCITRAL Rules also cover notice requirements, representation of the parties, challenges of arbitrators, evidence, hearings, the place of arbitration, language, statements of claims and defenses, pleas to the arbitrator’s jurisdiction,

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162. Id.
163. See UNCITRAL Rules, supra note 2. UNCITRAL was established by the General Assembly in 1966. In establishing the Commission, the General Assembly recognized “that disparities in national laws governing international trade created obstacles to the flow of trade,” and it regarded the Commission “as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.” See Origin, Mandate and Composition of UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin.html.
164. See G.A. Res. 31/98, ¶¶ 3-5, U.N. Doc A/RES/31/98 (Dec. 15, 1976). Developing countries often favor the Rules because of the care with which they have been drafted, and because UNCITRAL was a forum for developing arbitration rules where their concerns would be heard. The UNCITRAL Rules have inspired domestic legislation on arbitration and have been successfully used to resolve numerous private commercial disputes. See Elena V. Helmer, International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?, 19 OHIO ST. J. ON DISP. RESOL. 35 (2003).
165. For example, the London Court of Arbitration has worked with the UNCITRAL Rules. The Iran-United States Claims Tribunal also used the UNCITRAL Rules in dealing with claims arising out of the confrontation between the two countries in 1980. See Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 I.L.M. 257, arts. II and III(2) (1981).
167. See UNCITRAL Rules, supra note 2, art. 6.
provisional remedies, experts, default, rule waivers, the form and effect of the award, applicable law, settlement, interpretation of the award and costs.

In addition to its 1976 Model Arbitration Rules, UNCITRAL has also promulgated a 1985 Model Law on International Commercial Arbitration.\textsuperscript{168} Under the Model Law, submission to arbitration may be ad hoc for a particular dispute, but is accomplished most often in advance of the dispute by a general submission clause within a contract. Legislation based on the Model Law has been enacted in forty-six jurisdictions, and eight states of the United States: California, Connecticut, Florida, Georgia, North Carolina, Ohio, Oregon, and Texas.\textsuperscript{169}

A. Changes To The UNCITRAL Arbitration Rules

The UNCITRAL Rules, which have been in force since their adoption by UNCITRAL and the United Nations General Assembly in 1976, were not specifically tailored to resolve investor-state disputes or entertain claims for breach of customary or conventional international law.\textsuperscript{170} From a procedural perspective, disputes to which a state is a party involve questions of law or public interest that are distinct from an arbitration between private commercial parties. Indeed, the very presence of a state as a party in a dispute raises a public interest because nationals and residents of that state have an interest in how the government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has direct implications for the conduct of the arbitration: good governance and accountability in a democratic society require that government activities be transparent and open to public participation.\textsuperscript{171}

Also, many state arbitrations (especially those arising under investment protection treaties), by definition, involve direct allegations of government misconduct. The public interest, in knowing what the allegations, facts and outcome are, is self-evident. Finally, an increasing number of state arbitrations raise profoundly important issues of public policy that deeply affect domestic decision-making processes. To illustrate, important public policy issues raised in recent investor-state arbitrations in-

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\textsuperscript{170} Article 1(1) of the UNCITRAL Rules refers only to "disputes in relation to [a] contract."

include challenges relating to drinking water supply systems, hazardous waste sites, and taxes on high fructose corn syrup.\textsuperscript{172}

This public interest difference between state and commercial arbitrations has direct implications for the conduct of the arbitration. For example, there may be a need for particular procedural arrangements, such as separate phases on jurisdiction and admissibility before the submission of a statement of claim, amicus curiae briefs, and consolidation of claims and hearings.\textsuperscript{173} Although some BITs empower arbitral tribunals to amend the UNCITRAL Rules as necessary, or directly set forth particular procedures derogating from or supplementing the Rules, under the vast majority of BITs, parties and tribunals have to look for guidance outside the text of the UNCITRAL Rules in relation to such issues.

Accordingly, UNCITRAL agreed to give priority to the revision of its arbitration rules in July 2006, and began work on revising the rules in September 2006 in Vienna, Austria.\textsuperscript{174} The following analysis considers the main provisions in the UNCITRAL Rules that could significantly impact investor-state arbitrations.

1. Article 1(1): Scope of Application

Article 1(1) apparently limits the scope of the UNCITRAL Rules to “disputes in relation to [a] contract.”\textsuperscript{175} Clearly, however, the UNCITRAL Rules have been used, and will continue to be used, in investment disputes that either do not relate to a contract at all,\textsuperscript{176} or relate to a contract involving a person that is not a party in the arbitration.\textsuperscript{177} Therefore, Paulsson & Petrochilos in their 2006 report, which was commissioned by the UNCITRAL Secretariat as part of an initiative to spur discussion on the revision of the UNCITRAL Rules, proposed that the contractual dispute limitation be eliminated.\textsuperscript{178} Indeed, the law of the arbitration should govern the arbitrability of a dispute, and there is nothing on the face of the UNCITRAL Rules to suggest that they are not suitable for the resolution of non-contractual disputes.\textsuperscript{179} The elimina-

\begin{itemize}
\item \textsuperscript{172} Id. 70-1, 73-74.
\item \textsuperscript{173} UNCITRAL Report, supra note 11, ¶ 6.
\item \textsuperscript{174} See Report of Working Group II (Arbitration and Conciliation) on the work of its forty-sixth session, A/CN.9/619.
\item \textsuperscript{175} UNCITRAL Rules, supra note 2, art. 1(1).
\item \textsuperscript{176} See, e.g., Int’l Thunderbird Gaming Corp. v. United Mexican States (2006), http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf. (involving a dispute on the withdrawal of a license under an investment treaty).
\item \textsuperscript{178} UNCITRAL Report, supra note 11, ¶ 35. Consistent with article 1(1), provision should be made in article 3(3)(d) for disputes that do not arise “out of or in relation to” a contract.
\item \textsuperscript{179} See Larsen v. Hawaiian Kingdom ¶ 8 (2000), quoted at ¶ 6.2 of the Award (2001), which concerned a dispute about the alleged unlawful imposition of American municipal laws over claimant’s person within the territorial jurisdiction of Hawaii. The tribunal stated: “When regard is had to the non-prescriptive and non-coercive
tion of the contractual dispute limitation, moreover, would be consistent with article 7(1) of the UNCITRAL Model Law, which permits arbitration of disputes "in respect of a defined legal relationship, whether contractual or not," and ICSID.\(^{180}\)

2. \textit{Article 1(2)}

Article 1(2) makes clear that the application of the UNCITRAL Rules is subject to the controlling national arbitration law (the \textit{lex arbitri}) of a particular dispute.\(^{181}\) The Rules neither define which law is the controlling law, nor the provisions of the mandatory, (public law that parties cannot avoid by contract) provisions of that law. The arbitral tribunal generally resolves these issues. Yet it is often assumed that law can only be the law of a given state (ordinarily the law of the jurisdiction of the arbitration), as opposed to public international law. Although this is valid in the vast majority of cases, including UNCITRAL arbitrations under BITs or NAFTA, where a state or international organization is involved as an arbitrating party, the assumption is not always true. This uncertainty actually caused significant problems for the Iran-United States Claims Tribunal.\(^{182}\) The Paulsson & Petrochilos UNCITRAL Report, therefore, proposed that article 1(2) explicitly refer to "international law" thus enabling a tribunal to entertain claims for breach of customary or conventional international law.\(^{183}\)

3. \textit{Article 2: Notice, calculation of periods of time}

Article 2 of the UNCITRAL Rules does not deal with service on states. In practice, claimants initiating arbitrations against states variously serve Notices of Arbitration to the respondent state's Ministry of Foreign Affairs, the head of the government, other ministries, an ambassador of the respondent state, or autonomous state agencies. This practice, however, is incoherent, is prone to cause confusion, and does not assist states in nature of the UNCITRAL Rules as a standard regime available for parties to apply to resolve disputes between them, however, there appears no reason why the UNCITRAL Rules cannot be adapted to apply to a non-contractual dispute." The tribunal then provided several examples where the UNCITRAL Rules could be applied—the parties could agree that a dispute as to tort, or occupier's or environmental liability might be determined in an arbitration applying the UNCITRAL Rules. The parties could also agree to apply the UNCITRAL Rules to a dispute that had already arisen independently of any contractual relationship between them—disputing parties can specifically or by implication adopt or apply the UNCITRAL Rules to any dispute. \textit{Id.}

\(^{180}\). \textit{See} UNCITRAL Model Law, \textit{supra} note 168.

\(^{181}\). Again, legislation based on the UNCITRAL Model Law (especially article 34 dealing with recourse against an arbitral award) has been enacted in 46 jurisdictions worldwide, and eight states of the United States. Note that article 34 states that an application to set aside an award is the only available challenge against an international arbitral award and is similar in most respects to the language in the ICSID Convention governing Annulment Committee review. \textit{See} ICSID Convention, \textit{supra} note 1, art.52.


\(^{183}\). \textit{See} UNCITRAL Report, \textit{supra} note 11, ¶ 39.
receiving notice of proceedings in a timely fashion. The Paulsson & Petrochilos UNCITRAL Report, therefore, proposed a revision of article 2 to clarify that a state is sufficiently notified of arbitral proceedings initiated against it if notice is delivered to an organ of that state, capable of receiving service, under its laws.\textsuperscript{184} Note that some of the more recent FTAs concluded by the United States, such as CAFTA-DR, explicitly list the government entity of each Party that is to be notified, in large part to resolve the confusion that arises when arbitration is administered under the UNCITRAL rule 5.\textsuperscript{185}

4. Article 3: Notice of arbitration

Pursuant to article 3(1), the party initiating recourse to arbitration is required to give to the other party a notice of arbitration. Nothing in article 3, however, requires that the notice of arbitration be made known to the public. The current lack of a public register for arbitral proceedings involving a state as a party appears to be in direct conflict with democratic principles of good governance. Specifically, the public has a right to know about the initiation and thus the existence of an arbitral proceeding. Yet the Paulsson & Petrochilos UNCITRAL Report is silent regarding the need for a public register.\textsuperscript{186} Nevertheless, the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD), have argued that a copy of the notice of arbitration and the agreement on the composition of the tribunal should be transmitted to the UNCITRAL Secretariat, which would then post both documents on the UNCITRAL website.\textsuperscript{187} This would bring the UNCITRAL Rules in line with other rules and processes, such as those under ICSID, pursuant to which a public register of all arbitrations is already maintained. Similarly, the WTO systematically posts requests for consultation and the subsequent requests for establishment of a panel on its website.\textsuperscript{188}

\textsuperscript{184} Id. at ¶ 43.
\textsuperscript{185} See CAFTA-DR, supra note 127, art. 10.16.
\textsuperscript{186} There may be strong opposition to a public registry in the international business/arbitration community. Indeed, one of the traditional advantages of UNCITRAL over ICSID arbitration is that it is theoretically possible to keep the entire proceedings secret.
\textsuperscript{188} http://www.wto.org.
5. **Article 15(1): General Provisions**

Procedural flexibility is the primary advantage of international arbitration; the format and timetable of the arbitral proceedings can be tailor-made to the circumstances of each particular case. Accordingly, article 15(1) expressly permits the arbitral tribunal to “conduct the arbitration in such manner as it considers appropriate,” provided that each party receives equal treatment and a full opportunity to present its case, as specified in article 18 of the UNCITRAL Model Law.\(^\text{189}\)

Article 15(1), however, does not dictate the tribunal’s duty to ensure that arbitral proceedings are not unnecessarily delayed (another advantage of international arbitration is the speed of the arbitral process in contrast to international business litigation),\(^\text{190}\) nor does it delineate the power of arbitral tribunals to issue directions in that regard.

The Paulsson & Petrochilos UNCITRAL Report, therefore, proposed a revised text of article 15(1) that obligates the tribunal to take all steps necessary for an expeditious and efficient resolution of the dispute, and issue appropriate directions to the parties. The parties must also co-operate with (or among) each other and with the tribunal, including compliance with its directions. “Failure to do so may be taken into account by the arbitral tribunal in allocating the costs of the arbitration pursuant to article 40.”\(^\text{191}\)

6. **New Article 15(2)-(3)**

Preparatory meetings, which can be held to decide on the schedule and format of the proceedings, when witnesses will be heard, and when the tribunal considers the appointment of one or more experts, etc., are increasingly viewed as serving a useful purpose, particularly in more complex international arbitration proceedings. Indeed, preparatory meetings are expressly provided for under article 21(1) of the ICSID Rules. While current article 15(1) of the UNCITRAL Rules does not preclude tribunals from holding preparatory meetings, the Paulsson & Petrochilos UNCITRAL Report proposed the inclusion of an express provision enabling the arbitral tribunal to hold meetings regarding points at issue, settlement negotiations, etc.\(^\text{192}\) This provision would more closely reflect general international arbitration practice.

7. **New Article 15(4)**

Disputes occasionally arise between parties under separate contracts containing separate arbitration clauses that pose similar questions of law or fact. Additionally, for tactical reasons, parties often initiate multiple arbitrations with distinct claims arising under the same contract. Consoli-

\(^{189}\) See UNCITRAL Rules, *supra* note 2, art. 15(1).

\(^{190}\) Article 14(1) of the UNCITRAL Model Law, however, cautions against the failure of an arbitrator “to act without undue delay.”

\(^{191}\) UNCITRAL Report, *supra* note 11, ¶ 119.

\(^{192}\) Id. at ¶ 124.
dation, therefore, would ensure an efficient resolution of disputes between parties, and is consistent with article 15(1) of the UNCITRAL Rules. Consolidation would also reduce the possibility of inconsistent awards in parallel arbitrations.

Currently, consolidation is possible only where the parties agree. Moreover, article 19(3) states that the respondent can only bring a counterclaim “arising out of the same contract.” Yet there is no reason why counterclaims should be restricted to those that arise out of the same contract, especially in light of the modern trend to arbitrate several different kinds of non-contractual disputes under the UNICTRAL Rules.

Accordingly, the Paulsson & Petrochilos UNCITRAL Report proposed a provision for consolidation based on NAFTA article 1126(2), which would allow for consolidation of claims involving the same parties. This provision will help promote the fair and efficient resolution of claims and encourage parties to resolve disputes in the same proceedings.

8. New Article 15(5)

The UNCITRAL Rules are silent regarding a tribunal’s ability to accept and consider amicus curiae briefs. Article 15(1), however, has been held to confer the power on the tribunal to accept amicus briefs in written form. The Paulsson & Petrochilos UNCITRAL Report proposed that an explicit provision allowing arbitral tribunals to accept amicus briefs be included in the UNCITRAL Rules “especially in light of the frequent use of the UNCITRAL Rules in arbitrations under international investment treaties.”

Arbitral tribunals, in deciding whether to accept amicus curiae briefs, must consider whether the case involves significant issues of public interest that might benefit from third party participation, whether amicus submissions would assist the tribunal in the determination of a factual or legal issue, and whether the non-disputing party has a significant and legitimate interest in the dispute. It is unclear, however, how the tribunal

193. UNCITRAL Rules, supra note 2, art. 19(3).
194. UNCITRAL Report, supra note 11, ¶ 131. NAFTA article 1126(2) not only demonstrates that consolidation is feasible in ad hoc arbitration under the UNCITRAL Rules, but actually goes so far as to permit consolidations even when the parties are not the same.
195. Id. at ¶ 131. Justification for consolidation under the UNCITRAL Rules is also found in the ICC Rules. Pursuant to ICC rule 4(6), consolidation is allowed when all proceedings relate to the same “legal relationship,” on the premise that the parties have consented to give the tribunal the power to consolidate claims by choosing to arbitrate in accordance with the ICC Rules. Id. at ¶ 129.
196. See Methanex Corp. v. United States, ¶ 47 (2001), http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf. See also United Parcel Serv. of America Inc. v. Gov. of Canada, ¶ 72 (2001). The tribunal followed the Methanex decision, but added that “[t]he circumstances and the detail of the making of any amicus submissions would be the subject of consultation with the parties.” Id.
197. UNCITRAL Report, supra note 11, ¶ 133.
would deal with potentially dozens of amicus briefs in a particular case. Consequently, it should be clarified whether the tribunal can limit the number of amicus submissions.

Unlike the revised rule 37(2) of ICSID, which allows tribunals to accept amicus briefs, with or without the consent of the parties, new article 15(5) only allows for amicus participation if the parties have not agreed otherwise.198 This seems inconsistent with the concept of a friend of the court that serves to provide useful information to the tribunal, while leaving it up to the tribunal to determine how to use that information.

9. New Article 15ter

Articles 25(4) and 32(5) of the UNCITRAL Rules deal with confidentiality of hearings and awards respectively, but there are no rules regarding the confidentiality of the proceedings as such or of the materials (including pleadings) before the tribunal.199 Thus the Paulsson & Petrochilos UNCITRAL Report proposed an explicit provision on confidentiality that any materials used in the arbitration are confidential, with an exception for the submission of amicus briefs, to conform to revised article 15(5).200

While an explicit confidentiality rule might be useful in commercial disputes between private parties, the CIEL and IISD argue that such a rule is completely inappropriate in investor-state arbitrations since it prevents a government from making its own submissions available to the public, which is contrary to principles of good governance.201

Further, access to documents produced in the arbitration is necessary to operationalize provisions regarding amicus submissions. For example, a non-disputing party requesting leave to submit an amicus brief to a tribunal could not elaborate on whether its perspective, knowledge or insight is different from the disputing parties' or useful to the tribunal, if the record remains secret. [Likewise, a non-disputing party could not] prepare a submission within the scope of the when access to pleadings is denied.202

The CIEL and IISD, in support of their proposal, cite the NAFTA Parties' July 30, 2001 Notes of Interpretation of Certain Chapter 11 Provi-

198. ICSID revised rule 37 permits a tribunal to allow amicus participation without the approval of one or both of the arbitrating parties. While rule 37(2) requires a tribunal to consult with the parties, it does not allow either or both parties together to veto a decision by a tribunal. See ICSID 2006 Regulations and Rules, supra note 1, rule 37.

199. Although the current UNCITRAL Rules are silent with respect to the confidentiality of the materials produced during the proceedings, current article 15(3) (incorporated by the Paulsson & Petrochilos UNCITRAL Report in new article 15BIS) addresses a related issue: "All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party." UNCITRAL Report, supra note 11, ¶ 143.

200. UNCITRAL Report, supra note 11, ¶¶ 147, 148.

201. NGO Report, supra note 187, at 10.

202. Id. at 10.
sions, which states that NAFTA does not impose a general duty of confidentiality on parties to a chapter 11 dispute, and that the parties are not precluded from providing public access to documents submitted to, or issued by, a chapter 11 tribunal. The interpretation also requires NAFTA parties to make all documents publicly available "in a timely manner," subject to certain protections for confidential business and information that is privileged or otherwise protected from disclosure under a party's domestic law.

Additionally, every subsequent BIT and FTA negotiated by the United States expressly provides for the transparency of the arbitration, including access to documents in arbitrations under the UNCITRAL Rules. For example, article 29 of the United States-Uruguay BIT, concluded in 2004, requires open hearings and non-confidential materials. Finally, in addition to panel and Appellate Body rulings, the WTO generally makes several documents available to the public on its website, including the request for consultation and the subsequent request for establishment of a panel, the notification of appeal, and status reports (but not the briefs and other pleadings).

10. Article 25(4): Evidence and Hearings

Current article 25(4) provides that arbitral hearings must be held in camera unless the parties agree otherwise. In certain cases, however, it could be useful to open hearings to persons other than those directly involved in the proceedings, as in arbitrations where a state is a party to the dispute. Indeed, open hearings would provide the public with greater transparency of arbitrations under the UNCITRAL Rules.

Accordingly, the Paulsson & Petrochilos UNCITRAL Report proposed that article 25(4) be clarified to give the tribunal the power, after consulting the disputing parties, to allow third parties to attend hearings and to issue directions for the protection of proprietary or privileged information. This power would be particularly relevant when the tribunal decides to receive amicus submissions pursuant to the proposed revision.


204. Id. § A2b (providing exceptions for '(i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under law;" and (iii) information must be withheld pursuant to relevant arbitral rules). The interpretation also provides exceptions under NAFTA articles 2101 (national security) and 2105 (information that would impede law enforcement or affect personal privacy) in section A3.

205. See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Oct. 25, 2004, http://www.ustr.gov/Trade-Agreements/BIT/Uruguay/Section_Index.html. Note that Mexico, unlike the United States and Canada, never agreed in NAFTA to public hearings. There are probably many other governments that would object to this degree of transparency. Indeed, in WTO disputes most of the hearings other than those in which the parties are Canada, the United States, and the European Union are still closed.

206. NGO Report, supra note 187, at 8.
of article 15(5) of the UNCITRAL Rules, and would be consistent with ICSID. As noted above, ICSID revised rule 32(2) allows the arbitral tribunal to permit persons besides the parties, their agents to attend the hearings or even open them to the public, without the consent of both parties, provided it considers the views of the disputing parties and consults with the Secretariat. In addition, the revised rule 32(2) requires the tribunal, when necessary, to prescribe procedures to protect proprietary information and make the appropriate logistical arrangements.

11. Article 32(5)

Current article 32(5) provides that an award can only be publicized with the consent of the disputing parties. Consequently, a state must seek and obtain approval from the foreign investor to publish the award. A private party can thus block the publication of an award against the will of a state party and vice-versa. This provision seems out-of-date.

The Paulsson & Petrochilos UNCITRAL Report, therefore, proposed a revised text of article 32(5), which would allow the publication of an award “with the consent of the parties” or where a party must disclose an award because of a legal duty, “to protect or pursue a legal right or in relation to other [bona fide] legal proceedings.” This rule would be consistent with the ICSID revised rules, which do not require the consent of the parties for the publication of arbitral awards. Indeed, ICSID must “promptly include in its publications excerpts of the legal reasoning of the Tribunal,” even when parties do not agree to the publication of the award by ICSID. The same language is also used in ICSID’s Additional Facility Rules. UNCITRAL, however, has no secretariat to oversee arbitrations and thus an approach that would require the publication of excerpts of the tribunal’s legal reasoning is probably unavailable.

B. Conclusion

The challenge for UNCITRAL has been to revise its rules to more accurately reflect the great advances in arbitral practice that have occurred since their promulgation, while ensuring that the Rules continue to meet the needs of their users, reflecting best practice in the field of international arbitration. Although the proposed revisions are incremental, they...
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reflect a growing trend in investor-state arbitration towards increased transparency and public participation. Obviously, the real effect of these proposed reforms on investor-state arbitration will depend on how they are written and implemented in practice. Nevertheless, they are more in line with other arbitral rules and processes, such as those under ICSID. Investors and corporate counsel are well advised to keep informed about these developments as they consider investor-state arbitration as a means of resolving disputes with government entities.

IV. CONCLUSION

As explained earlier, the number of investor-state arbitrations administered by ICSID, or under the UNCITRAL Arbitration Rules has increased dramatically, resulting in a growing body of international investment law. This growth is largely the result of the proliferation of bilateral commitments to encourage foreign direct investment and FTAs at the bilateral, regional and interregional level containing consents, on the part of the States concerned, to the ICSID Convention, the Additional Facility Arbitration, or the UNCITRAL Arbitration Rules. This trend seems certain to continue, given the very large and still growing number of treaties with such consents. Indeed, many countries, including the United States, have pushed to open trade markets with sub-regions or individual countries since the Doha debacle, where the 148 member countries of the WTO failed to agree to a multilateral trading system. Accordingly, both ICSID and UNCITRAL have implemented or are in the process of implementing reforms to their rules. Although the changes are incremental, they reflect a growing trend in investor-state arbitration towards increased transparency and public participation, and (in the case of ICSID) a greater willingness to draw inspiration from litigation based models of dispute resolution. Obviously, the real effect of these reforms on investor-state arbitration will depend on how they are written and implemented in practice. Still, these reforms represent an important step forward in addressing modern arbitral realities and ensuring their continued relevance in the field of international arbitration.

ICSID, however, must further respond to the many changing demands on the institution. ICSID must change its governing structure in order to maintain an efficient, highly technical investor-state arbitration process. ICSID must be more adequately staffed and funded, and have ICSID-arbitration focused senior management. Although the ICSID Convention dictates how to operate ICSID, some things are flexible, and these changes can be made consistent with the Convention. If these changes are not made investors may start to abandon ICSID for another less-burdensome arbitral system.

As this article has tried to show, moreover, many Latin American jurisdictions have recently threatened the autonomy of international arbitration, and have even withdrawn from ICSID itself (no government had formally withdrawn from ICSID until now). It is unclear how ICSID will
respond and whether ICSID can do anything at all. Remember, ICSID like all other international bodies lacks institutional remedies against non-complying states and must rely on contracting states to enforce an award within the framework of their national laws on sovereign immunity and existing treaty obligations. As such, investors and corporate counsel are well advised to keep informed about these developments as they consider investor-state arbitration, administered pursuant to the Convention, as a means of resolving disputes with government entities. Even if state measures impair investment rights thereby crippling an investors' ability to do business in a given state, ICSID claims may be foreclosed and unavailable.